Nos. 77-1575, 77-1648, 77-1662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1662

NATIONAL BLACK MEDIA COALITION,
CITIZENS FOR CABLE AWARENESS IN PENNSLYVANIA,
AND PHILADELPHIA COMMUNITY CABLE COALITION,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS NATIONAL BLACK MEDIA COALITION, ET AL.

EDWARD J. KUHLMANN
JEFFREY H. OLSON
CITIZENS COMMUNICATIONS CENTER
1424 16th Street, N.W.
Suite 404
Washington, D. C. 20036

Attorneys for Petitioners

Of Counsel:

CHARLES M. FIRESTONE
COMMUNICATIONS LAW PROGRAM
UCLA School of Law
Los Angeles, California 90024

November 16, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions Below.	1
Jurisdiction.	2
Constitutional, Statutory and Regulatory Provisions	2
Questions Presented	3
Statement	3
A. Efforts to Insure Access to Broadcasting	5
B. Efforts to Preserve Access on Cable Television Systems	11
Summary of Argument	22
Argument.	22
I. The Communications Act Grants the FCC Broad Jurisdiction to Regulate Interstate Communications to Serve the End of Diversity	25
A. The Communications Act Grants the FCC Authority to Promulgate the Challenged Cable Television Regulations. .	26

Page

B. The Access, Minimum Channel, and Equipment Requirements Are a Reasonable Exercise of the Commission's Authority 28

C. The Regulations Are a Rational Exercise of the Commission's Authority and Are Based on a Consideration of the Relevant Factors . 37

II. On the Record of This Case, the First Amendment Does Not Prohibit the Access, Minimum Channel and Equipment Requirements . . . 39

Conclusion. 51

Appendix i

TABLE OF AUTHORITIES CITED

Cases Page

American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975). 35

American Civil Liberties Union v. FCC, No. 76-1695 (D.C. Cir. remanded Aug. 26, 1977). 47

Ashbacker Radio Co. v. FCC, 326 U.S. 327 (1945). 5

Associated Press v. United States, 326 U.S. 1 (1945). 7

Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972), cert. denied 412 U.S. 922. 6

Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) (en banc). 9

Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973) . . . . . .passim

FCC v. National Citizens Committee for Broadcasting, ___ U.S. ____, 98 S. Ct. 2096 (1978). 7,8,34, 38,42

FCC v. Pacifica Foundation, ___ U.S. ___, 98 S. Ct. 3026 (1978) 41

FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940). 7,28

Page

FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) 6

Federal Power Commission v. Transcontinental Pipeline Corp., 365 U.S. 1 (1961) 38

Federal Radio Commission v. Nelson Bros., 289 U.S. 266 (1933) 6

First National Bank of Boston v. Bellotti, ___ U.S. ___, 98 S. Ct. 3126 (1978) 43

Fortnightly Corp. v. United Artists Television, Inc., 396 U.S. 390 (1968) 43

Geller v. FCC, No. 77-1093 (D.C. Cir. filed January 19, 1977, argued February 23, 1978) 16

General Telephone Co. of California v. FCC, 413 F.2d 390 (D.C. Cir. 1969) cert. denied 396 U.S. 888. . 13

General Telephone Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971) 13

Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 16,50

Iacopi v. FCC, 451 F.2d 1142 (9th Cir. 1971) 14

Page

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). . . .42,49

Mt. Mansfield Television, Inc. v. FCC, 422 F.2d 470 (2d Cir. 1971). 10

National Broadcasting Corp. v. United States, 319 U.S. 190 (1943) 10,28,41

Permian Basin Area Rate Cases, 390 U.S. 747 (1968). 29

Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966) 35

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). . . . . .passim

United States v. Midwest Video Corp., 406 U.S. 649 (1972) . . . .passim

United States v. Southwestern Cable Co., 392 U.S. 157 (1968) . . . . .passim

United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) 7

Agency Decisions and Orders

Amendment of the Multiple Ownership Rules, 18 Fed. Reg. 7796 (1953). . 7

Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C. 2d 418 (1976) 9

Page

Cable Television Report and Order in Docket 18397, et al., 36 F.C.C. 2d 141 (1972) 19,30

Cullman Broadcasting Co., 40 F.C.C. 576 (1963) 7

Duopoly Rules, 5 Fed. Reg. 2382 (1940), 6 Fed. Reg. 2282 (1941), 8 Fed. Reg. 16065 (1943) 7

First Report and Order (CARS), 1 F.C.C. 2d 897 (1965) 15

First Report and Order in Docket No. 18397, 20 F.C.C. 2d 201 (1969) 13

Midwest Television, Inc., 15 F.C.C. 2d 84 (1968). 18

Notice of Inquiry: Commercial Television Network Practices and the Ability of Station Licensees to Service the Public Interest, 42 Fed. Reg. 4991 (1977) 11

Notice of Inquiry on the Airing of Public Service Announcements by Broadcast Licensees, 43 Fed. Reg. 37725 (1978). 11

Notice of Inquiry: The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard of the Communications Act, 43 Fed. Reg. 9201 (1978). 10

Page

Notice of Proposed Rule Making, Adoption of Rules for the Regulation of Cable Television Pole Attachments, 43 Fed. Reg. 19886 (1978) 14

Notice of Proposed Rule Making and Notice of Inquiry (To Expand the Frequencies Available for Use by Television Relay Service), 43 Fed. Reg. 9500 (1978). 16

Order in Docket 19554, 42 Fed. Reg. 64348 (1977) 16

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965). 5

Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). 8

Report and Order in Docket 18452, 20 F.C.C. 2d 415 (1969). 15

Report and Order in Docket 17999 (LDS), 20 F.C.C. 2d 422 (1969) . . 15

Report and Order in Docket 18397, 36 F.C.C. 2d 141 (1972). 15

Report and Order in Docket 20363, 54 F.C.C. 2d 207 (1975). 16

Second Report and Order, 2 F.C.C. 2d 725 (1966). 32

Page

Young Peoples Association for the Propogation of the Gospel, 6 F.C.C. 178 (1938). 8

Constitutional, Statutory and Regulatory Provisions

Communications Act of 1934, 48 Stat. 1064, as amended:

47 U.S.C. §151 (1970). 22,27,33
47 U.S.C. §152(a)(1970). 22,27
47 U.S.C. §153(a)(1970). 22,27
47 U.S.C. §153(b)(1970). 22,27
47 U.S.C. §153(h)(1970). 36
47 U.S.C. §224 (1978); Pub. L. 95-234, 92 Stat. 33, §6. 14
47 U.S.C. §307(b)(1970). 32,33
47 U.S.C. §315 (1970). 10
47 U.S.C. §303(g)(1970). 33

United States Constitution, Amendment I. . . . . .passim

Rules and Regulations of the Federal Communications Commission:

47 C.F.R. §25.103 (1977) 16
47 C.F.R. §25.202 (1977) 16
47 C.F.R. §76.56(a)(1977). 46
47 C.F.R. §76.59 (1977). 17,45
47 C.F.R. §76.60 (1977). 17,45
47 C.F.R. §76.61 (1977). 17,45
47 C.F.R. §76.62 (1977). 17,45
47 C.F.R. §76.63 (1977). 17,45

Page

47 C.F.R. §76.205 (1977) 17
47 C.F.R. §76.209 (1977) 17
47 C.F.R. §76.252 (1977) 30
47 C.F.R. §76.254 (1977) 30
47 C.F.R. §76.256(a)(1977) 30

Miscellaneous

Bollinger, Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich. L. Rev. 1 (1976). 15

L. Brown, "Knickerbock Given Cable-TV Franchise for Queens", N.Y. Times, Nov. 7, 1978 at p. 91 . . . 12

Cabinet Comm. on Cable Communications Report to the President (1974) 13

R. Kletter, Cable Television: Making Access Effective (1973) . . 21

L. Lichty & M. Topping, American Broadcasting, A Sourcebook on the History of Radio and Television (1972). 12

E. McDowell, "To Cable TV Industry, Picture Is Bright", N.Y. Times, May 4, 1978 at p. 47 17

A. Meiklejohn, Political Freedom (1960) 44

Page

D. Othmer, The Wired Island (1973) 21

B. Schmidt, Freedom of the Press vs. Public Access (1976). 48

Nos. 77-1575, 77-1648, 77-1662

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 77-1662

National Black Media Coalition,
Citizens for Cable Awareness in
Pennsylvania, and Philadelphia
Community Cable Coalition,
Petitioners,

v.

Midwest Video Corporation, et al.
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONERS NATIONAL BLACK MEDIA COALITION, ET AL.

OPINIONS BELOW

The opinion of the court of appeals

is reported at 571 F.2d 1025 (App. A).[1/] The orders of the Federal Communications Commission are reported at 59 F.C.C. 2d 294, reconsideration, 62 F.C.C. 2d 399 (1976).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1), the Court having granted and consolidated the various petitions for a writ of certiorari in this review on October 2, 1978.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The First and Fifth Amendments are set forth at the end of the brief. The pertinent statutory provisions are set

---

1/ Appendix citations in this brief are to the Federal Communications Commission's "Petitioners Appendix" submitted with its petition for writ of certiorari in No. 77-1575, docketed May 4, 1978, certiorari granted October 2, 1978, 42 U.S.L.W. 3221, and consolidated with this case. The FCC appendix is divided alphabetically into parts A-F and therefore all references will be to "App." followed by the lettered part and page.

forth at App. E, pp. 209-211. The pertinent regulations are set forth at 47 C.F.R. 76.252 et seq. and App. B, pp. 168-176; App. C, pp. 202-203.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has statutory authority to promulgate rules requiring certain cable television systems (1) to have the capacity to provide at least 20 channels; (2) to provide access to third parties on channels or parts of channels not being used by the system for its regular services, and (3) to make available certain equipment and facilities to those third parties.

2. If so, whether such rules are consistent with the First and Fifth Amendments.

STATEMENT

The brief for the Federal Communications Commission and the United States sets forth a full history of the proceeding which led to Midwest Video's challenge to the channel capacity and access rules in the eighth circuit, and, ultimately, to this petition. The peti-

tioners in this case, No. 77-1662, The National Black Media Coalition, et al. (NBMC), adopt their characterization of the rules and the proceeding. However, the court of appeals opinion suffers from several misconceptions about the role of access in broadcasting and its evolution on cable systems. The eighth circuit apparently believed that the history of broadcast regulation was one of complete deference to licensee views (App. A., 29-30, 34-46, 55) and that the access system devised by the Commission is frivolous in comparison to the greater interest of the cable operator to be free of such restrictions in operating his business (App. A, 1-91 passim). Both perceptions suffer from historical inaccuracy. The circuit court misconceives the First Amendment and democratic values which the Communications Act seeks to forward. Therefore, as a preliminary matter petitioners will briefly review the regulatory context in which these access rules came about.

A. Efforts To Insure Access To Broadcasting.

Largely, the FCC's actions to achieve access have been to insure a diversity of views. Thus, the Commission often speaks of access in terms of diversity of ownership of broadcast stations and diversity of viewpoints on broadcast programs. But because of limitations on spectrum space, the number of persons who could speak or choose who could speak over the airwaves has always been limited.[2/] Thus, to one degree or another, the entire history of broadcast regulation by the government could be viewed as an attempt to overcome scarcity and expand access to not just

---

2/ However, because of scarcity the selection of licensees or speakers under the Communications Act, there has always been the necessity to maintain strict fairness in which applicants were selected. See Ashbacker Radio Co. v. FCC, 326 U.S. 327 (1945); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965).

ideas but speakers who might assert ideas. Initially the FCC, and its predecessor the Federal Radio Commission, focused on the allocation of frequencies and the selection of licensees. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-377 (1969); Federal Radio Commission v. Nelson Bros., 289 U.S. 266 (1933). Moreover, from the very inception of the Communications Act the Commission was faced with broadcast licensees who tried to foreclose access by arguing against the operation of additional stations in their service area, FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), and by trying to exclude views, other than their own. Red Lion Broadcasting Co. v. FCC, supra. See also Brandywine-MainLine Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972), cert. denied 412 U.S. 922. These attempts to thwart access were to be expected; afterall, Congress, when it enacted the Communications Act, "moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic

domination in the broadcast field." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

The Commission has sought to lessen the monopolistic control of broadcasting by limiting the number of stations any-one person can hold as a public trustee. See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956);[3/] FCC v. National Citizens Committee for Broadcasting, ___ U.S. ___, 98 S. Ct. 2096 (1978). In the context of control of licenses the Commission has been guided by the access maxim that "the widest possible dissemination of information from diverse and antagonistic sources"[4/]

3/ Affirming, Amendment of the Multiple Ownership Rules, 18 Fed. Reg. 7796 (1953); See also Duopoly Rules, 5 Fed. Reg. 2382 (1940), 6 Fed. Reg. 2282 (1941), 8 Fed. Reg. 16065 (1943) (barring common ownership of local broadcast stations in the same community, and requiring divestiture)

4/ Associated Press v. United States, 326 U.S. 1, 20 (1945).

is encompassed within the public interest standard of the Communications Act. FCC v. National Citizens Committee For Broadcasting, ___ U.S. at ___, 98 S. Ct. at 2107.

While overall the Commission has looked to licensees to provide the public with a variety of viewpoints, they have not been given complete discretion. The Fairness Doctrine, for example, requires that broadcasters adequately inform the public on controversial issues that the public considers to be of importance. Young Peoples Association for the Propagation of the Gospel, 6 F.C.C. 178 (1938), Report On Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949) A broadcaster's obligation to air opposing viewpoints extends to bearing the expense of their coverage if no other sponsor comes forward. Cullman Broadcasting Co., 40 F.C.C. 576 (1963).

Licensees are required to survey the general public and community leaders throughout the three year period that they hold a license, to determine what the audience

believes to be the needs and problems of the service area, and to then initiate programming to meet those needs and problems. Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C. 2d 418 (1976).[5/] Under certain circumstances, traditional First Amendment rights arise, and the public is then granted the right to speak for itself over-the-air. When someone is personally attacked on a broadcast, the individual attacked must be offered an opportunity to respond, either by himself or through a spokesperson. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1968). Additionally, the Communications Act permits legally qualified candidates the use of a station, if the licensee has permitted

---

5/ The public's right to hear extends not only to the licensee's obligation to broadcast diverse views on public issues and problems, but to attempts by radio licensees to alter their entertainment formats. Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) (en banc).

another candidate to be heard. 47 U.S.C. §315 (1972). On the other hand, the Commission has the discretion to foreclose access to individual speakers and on occasion it has done so. See Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973). It is, however, currently considering whether practical means exist which would permit access by individual speakers to voice their views on public issues, free of licensee and Commission control. See Notice of Inquiry: The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard of the Communciations Act, 43 Fed. Reg. 9201 (1978).

Repeatedly, the Commission has been required to act, to insure that licensees would be free to respond to diverse public views. For example, network monopolization of programming, first in radio, National Broadcasting Corp. v. United States, 319 U.S. 190 (1943), and then in television, Mt. Mansfield Television, Inc. v. FCC, 422 F.2d 470 (2d Cir. 1971), has been the subject of lengthy proceedings in an effort to preserve licensee freedom to

independently program for the assigned service areas.[6/]

B. Efforts To Preserve Access On Cable Television Systems.

Cable technology is capable, unlike over-the-air broadcast stations, of performing both broadcast and common carrier functions. Coaxial cable's initial commercial use has been to carry through cable existing television and radio stations to subscribers.[7/] See United States v. Southwestern Cable Co., 392 U.S. 157 (1968). While a cable system

---

6/ The problem has been complex and reoccurring. See Notice of Inquiry: Commercial Television Network Practices And The Ability of Station Licensees to Service the Public Interest, 42 Fed. Reg. 4991 (1977) (Inquiry regarding acquisition and distribution of programming); See also Notice of Inquiry on the Airing of Public Service Announcements by Broadcast Licensees, 43 Fed. Reg. 37725 (1978).

7/ Cable, but not coaxial cable which came into use about 1934 and was the first cable that could carry television signals, has long been used in broadcasting. In 1893, it was used to provide a commercial broadcasting system in Budapest, Hungary. The system transmitted music and news

(cont. on next page)

has the capability of bringing to subscribers many more television signals than currently exist in any community in the country, it also has the ability to originate programming to be distributed to subscribers. United States v. Midwest Video Corp., 406 U.S. 649 (1972). Cable technology, unlike over-the-air broadcasting, is capable of transmitting simultaneously literally dozens of aural and video signals.[8/] However, multiple channel systems do not insure that more people will be heard or that more ideas will be examined. Cable

---

7/ (cont. from previous page) programming to residences twelve hours per day. In this country similar hook-ups of cable provided church services and special events to subscribers. The Chicago Telephone Company, in the election of 1884, broadcast Congressional and election returns to over 15,000 listeners. See L. Lichty & M. Topping, American Broadcasting, A Sourcebook On the History of Radio and Television, at 17-18 (1972).

8/ Practically speaking, most new systems being built plan on having initially available about 30 channels. Brown, "Knickerbocker Given Cable-TV Franchise for Queens" The New York Times, November 7, 1978 at 91.

systems are natural monopolies within their service areas, and, because of this, it could lead to an even greater concentration of power than exists in broadcast television. "When a single cable operator has the power to control the programming and information content of all the channels on his system, his monopoly power over the cable medium of expression is nearly absolute."9/

As it has in broadcasting, the Commission has sought to remove possible restraints on the growth and diverse ownership of cable by restraining monopolistic practices that would restrain its development. See General Telephone Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971); General Telephone Co. of California v. FCC, 413 F.2d 390 (D.C. Cir. 1969) cert. denied 396 U.S. 888. (Where the court reviewed

---

9/ Cabinet Comm. On Cable Communications Report To The President, 12 (1974) See also First Report and Order, 20 F.C.C.2d 201, 222 n.27 (1969) (Docket No. 18397):
(cont. on next page)

the FCC's regulation of the competitive problems between telphone companies that offer cable service and other entities providing cable service.)[10/] The Commission has also acted to insure that the television networks would not dominate cable ownership. See Iacopi v. FCC, 451 F.2d 1142 (9th Cir. 1971).

9/ (cont. from previous page) cable television's operations have developed on a non-competitive, monopolistic basis in the particular areas served with no instance, to our knowledge, where a member of the public subscribes to more than one cable television service.

10/ The Congress has also acted to protect cable development when a system is faced with problems in bargaining over rates, terms and conditions for pole attachments, usually with or electric companies for the use of their poles. The Commission is given the jurisdiction, if not exercised by the individual states, to insure that such rates are just and reasonable. 47 U.S.C. §224 (1978); Pub. L. 95-234, 92 stat. 33 §6 (February 21, 1978). The Commission is currently acting to set rules to govern this problem. Notice of Proposed Rule Making, Adoption of Rules

(cont. on next page.)

Additionally, the Commission has sought to facilitate the transfer of over-the-air television signals to cable systems, and the movement of programming that a cable system originates, by the allocating of microwave and satellite frequencies for cable system use. Each kind of signal expands a cable system's access to programming.11/

10/ (cont. from previous page) for the Regulation of Cable Television Pole Attachments, 43 Fed. Reg. 19886 (1978).

11/ The first microwave frequencies, for distribution of television signals to cable systems, were allocated in 1965. First Report and Order (CARS), 1 F.C.C. 2d 897 (1965) Later, frequencies were allocated to allow systems to relay programming material the cable system originated and wanted to transport for use within the system. Report and Order in Docket 17999 (LDS), 20 F.C.C. 2d 422 (1969); Report and Order in Docket 18452, 20 F.C.C. 2d 415 (1969). Then the available frequencies were expanded again, to aid cable systems to expand and grow in large cities, and to permit low cost expansion to rural and suburban areas, without the use of costly cable to connect the adjacent areas to the central system. Report and Order in Docket 18397, (cont. on next page)

Prohibitions which limited cable systems access to feature films and sports events for pay cable have also come under scrutiny and have been set aside, in part, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829, and, ultimately deleted by the Commission. Order in Docket 19554, 42 Fed. Reg. 64348 (1977)[12/] In short, similar measures

---

11/ 36 F.C.C. 2d 141 (1972); Report and Order in Docket 20363, 54 F.C.C. 2d 207 (1975). Further consideration is currently being given to allocating even more spectrum space to facilitate the transfer of programming for cable systems. Notice of Proposed Rule Making and Notice of Inquiry (To Expand the Frequencies Available for Use by Cable Television Relay Service), 43 Fed. Reg. 9500 (1978). Satellites are also being used to transport programmming to cable systems. See 47 C.F.R. §§25.103, 25.202. There will be, (cont. on next page)

12/ Review is currently being sought of the Commission's refusal to reconsider its rules restraining the carriage television of distant signals. Geller v. FCC, No. 77-1093 (D.C. Cir. filed January 19, 1977, argued February 23, 1978).

to those taken by the Commission to assist broadcasters in serving the public interest have also been taken to assist cable systems.

Cable systems that originate programs must provide, like over-the-air television, a right of reply to a person attacked, time to opposing candidates for public office, and comply with the Fairness Doctrine. 47 C.F.R. §§76.205, 76.209 (1977). In addition, a cable system cannot refuse to carry a local television signal. 47 C.F.R. §§76.59-76.63 (1977).

11/ (cont. from previous page) it is estimated, 450 satellite earth stations serving cable systems by the end of the year, which will amount to nearly two-thirds of all available earth stations. Satellites will provide cable with a more reliable, less costly means of program distribution and it will greatly expand the programming offered. McDowell, "To Cable TV Industry, Picture Is Bright," The New York Times, May 4, 1978, p. 47.

The access and channel capacity rules that are before the Court essentially deal with the same diversity problem the Commission has faced in broadcasting, but within the technical context of cable television, namely, a single licensee's control of a scarce frequency. A cable operator could potentially control access to all of the channels that are available to his subscribers, not just one outlet as is the case in broadcasting. Moreover, he can keep the number of channels available artificially low to increase scarcity and decrease access. In other words, the very attributes of technological and economic abundance which the Commission sought to foster through permitting cable systems to carry television signals and to use microwave frequencies, would be foreclosed.13/

When the amended rules, under consideration in this case, were

---

13/ See Midwest Television Inc., 15 F.C.C. 2d 84 (1968).

first issued in 1972, the Commission sought through the channel capacity and non-broadcast channel requirement to "measure cable's technological promise, assess its role in our nationwide scheme of communications, and learn how to serve the public." Cable Television Report and Order in Docket 18397, et al., 36 F.C.C. 2d 141, 189 (1972) At that time the Commission stated its goal as follows:

> We envision a future for cable in which the principal services, channel uses, and potential sources of income will be from other than over-the-air signals. We note 40, 50, and 60 channel systems are currently being installed in some communities. The cost difference between building a 12 channel system and a 20 channel system would not appear to be substantial.
>
> * * *
>
> Broadcast signals are being used as a basic component in the establishment of cable systems, and it is therefore appropriate that the fundamental goals of a national communications structure be furthered by

> cable -- the opening of new outlets for local expression, the promotion of diversity in television programming, the advancement of educational and instructional television, and increased informational services of local governments. Id. at 190.

The current rules before the Court adjust this original view to what the Commission believes to be a more realistic goal in light of four years experience, but the premise is the same.

Time has established that access users range from pay cable entrepreneurs (who lease channels, often install converters, and program entertainment) to individuals who want to communicate their views on public issues on the public access channel.[14/]

14/ Often, public access programming has been uniquely local, portraying housing issues, joblessness and the increase in crime in the very community where those viewers live and work. The users on public access programs have raised immediate community concerns, such

(cont. on next page)

Thus, cable access is well within traditional Commission actions, but in a mode and manner unique to cable television. Moreover, access has thus far fostered the very First Amendment ideals that the Commission has sought to further in the electronic media, and it has furthered the democratic ideals which broadcast licensing has never fully permitted.15/

14/ (cont. from previous page) as the need for a traffic light. D. Othmer, The Wired Island, 6 (1973). They have provided an educational basis for viewers who wish to know more about schizophrenia, or how to find an apartment in that community. Id. at 7. Users have also provided minorities with programs oriented towards their specific needs and interests. R. Kletter, Cable Television: Making Access Effective, 35 (1973). Most users of public access channels fall into three basic categories: "organizations established for the specific purpose of producing for, and developing users of, public access; existing organizations which use public access as an additional way of reaching their audience, and occasional individual users." The Wired Island, at 8.

15/ See Bollinger, Freedom of the Press and Public Access: Toward A Theory of Partial Regulation of the Mass Media, 75 MICH. L. REV. 1, 27 (1976).

SUMMARY OF ARGUMENT

Cable television provides a means of carrying to home subscribers a "spectrum" of electronically transmitted services -- broadcast programming and a variety of other services such as devices to monitor home security and transmission of computerized data for businesses. The basis of its economic support has been, from its inception, the transmitting of television station signals, both those that exist in the community where service is offered, and those from other communities too distant for the viewer to receive without the assistance of the cable system.

Cable systems present the possibility of assisting and hampering the FCC in acheiving the Congressionally mandated goal of a diverse national communiations system that serves all the people. Southwestern Cable Co., supra; United States v. Midwest Video Corp., supra Because cable systems are interstate communications regulated under the Communications Act (47 U.S.C. §§151, 152(a); 153(a), (b)), and because they

rely for their economic support on existing television signals, this Court in Midwest Video concurred in the Commission's determination that "CATV systems, no less than broadcast stations, . . . may enhance as well as impair the appropriate provision of broadcast services." 406 U.S. at 664-665 (plurality opinion). There, the Chief Justice stated that "[T]he essence of the matter is that when [cable systems] interrupt the signal and put it into their own use for profit, they take on burdens . . ." 406 U.S. at 666 (Burger, J. concurring opinion).

In this case, the access and minimum channel regulations impose such a burden, but they are requirements premised on enhancing speech by increasing the number of voices that can participate in public debate. The minimum channel requirements remove the possibility of a cable system maintaining artificial scarcity in its service area, where it always enjoys a monopoly granted by local governments. The access channel requirements are a relatively low cost means

of permitting members of the community, the government, and the schools to better serve the common weal. Moreover, leased access provisions assist the system operator in the development of new commercially supported services such as pay programming. The regulations are a reasonable means of achieving diversity, well within traditional Communication's goals. Moreover, the Commission measured the validity of the rules against the economic cost of their provision. Most importantly, it relieves the suppression of First Amendment values that results from the limited and stifling system of broadcast licensing.

It will be argued in this case by the respondent, Midwest Video, that the regulations curtail its First Amendment rights in deference to the public's. This assertion is inaccurate, however, within the context of a cable television system's overall business. Cable, both in practice, and under the Commission's rules, offers not just one channel of service, but a whole spectrum of service. The operator of a system exercises no

editorial discretion over the television signals; the Commission's rules prohibit such an action. Moreover, even the choice of signals is carefully circumscribed by complex formulas. The system operator's role is to deliver as full a compliment of signals as is possible. Albeit, he can initiate programming, but that function is now within his discretion and these rules do not take from that discretion or regulate it in any manner. The First Amendment rights pointed to by the court below do not arise in this case. They are rights which the court of appeals identified not from assessing this record, but through analogy to those found in other cases based on other factual circumstances. We do not view the cable operator as having no First Amendment rights; his rights are the equal of everyone elses. But, in this case, his right to be free to speak has not been infringed.

ARGUMENT

I. THE COMMUNICATIONS ACT GRANTS THE FCC BROAD JURISDICTION TO REGULATE INTERSTATE COMMUNICATIONS TO SERVE THE END OF DIVERSITY.

A. The Communications Act Grants The FCC Authority To Promulgate The Challenged Cable Television Regulations.

The court of appeals concluded that cable television was not within the jurisdictional ambit of the Communications Act because cable systems were neither broadcast stations within Title III of the Act, nor were they common carriers within Title II of the Act. (App. A 5-6, 20-24) In the view of court of appeals, because cable systems do not come within the provisions of those titles, they escape the Act's grasp, unless, it is necessary to reach their activities because of the danger they pose to or the similarity the requirement has with broadcast television. This view, we believe, is inconsistent with this Court's reading of the Communication's Act in United States v. Southwestern Cable Co., supra. and United States v. Midwest Video Corp., supra.

In both of those cases the Court reviewed the scope of the Commission's general authority. In Southwestern the Court found the provisions

of the Act to be "explicitly applicable" to cable television. 392 U.S. at 167. The Southwestern Court specifically considered and rejected the eighth circuit's premise that because cable television is neither a common carrier nor a broadcast station it escapes the grasp of the Commission's jurisdiction. 392 U.S. at 172.

Moreover, the Court made clear in Southwestern that cable was communications within Section 3(a) and (b) of the Act, 47 U.S.C. §153(a), (b), and, that it is within the Commission's general authority granted in Section 2(a), 47 U.S.C. §152(a) (App. E, 209) and subject to the mandate of Section 1, 47 U.S.C. §151 (App. E, 209), to serve the Nation's communications needs. These "general terms amply suffice," the Southwestern Court held, to subject cable system operations to regulation. 392 U.S. at 168.

The Southwestern Court emphasized that Congress intended, and its opinions had always found, that the Act purposely granted to the Commission

broad authority and a comprehensive mandate to flexibly handle the dynamic changes in communications. 392 U.S. at 172-173.[16/]

Thus, the court of appeals misinterpreted the scope of the Commission's power over all interstate communications by limiting that power to essentially broadcast radio and television and communications common carriers. This flawed view resulted in an improper testing of the validity of the access regulations.

B. The Access, Minimum Channel, And Equipment Requirements Are A Reasonable Exercise Of The Commission's Authority.

In both Southwestern and Midwest Video, the Court tested the reasonableness of the Commission's exercise of its jurisdiction on the basis of whether it was necessary "to

---

16/ The Court cited its earlier holdings in National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

perform with appropriate effectiveness certain of its other responsibilities." Southwestern, supra. 392 U.S. at 173. Only if there is "compelling evidence" that the Commission's regulation is not within Congress' intention, the Court stated, quoting from Permian Basin Area Rate Cases, 390 U.S. 747, 780 (1968), will the court "prohibit administrative action imperative for the acheivement of an agency's ultimate purposes." Id. at 177.

The court of appeals is not clear why the objectives the Commission rested on are prohibited but, apparently, the lower court believed that only if the regulations governed a "deleterious interrelationship of cable systems to broadcasting" or if they "require that cable systems do what broadcasters do" could they be valid. (App. A, 28). The court of appeals concluded that the objectives pointed to by the Commission's did not fit the above objectives and that they were not in the statute but were of the Commission own making. (App. A. 32-39). It also stated that there is no established need for the regulations

(App. A. 46-48). Overall, the court gave no weight to this Court's view in Southwestern and Midwest Video that the same objectives as those asserted here were legitimate Commission goals.

Briefly, the Commission's rules provide:

> a.) That cable systems with 3500 or more subscribers must provide at least twenty channels. Newly constructed systems must comply when built, and existing systems by 1986. 47 C.F.R. §76.252 (1976).
>
> b.) That the channels must be made available to the public, the government, schools, and commercial lessees under various circumstances depending upon demand, the time sought, and the other services being offered on the system. 47 C.F.R. §76.254(a) (1976).
>
> c.) That basic equipment must be made available to public access users to produce programs. 47 C.F.R. §76.256(a) (1976).

These requirements, like the origination requirement reviewed in Midwest Video, were imposed because the basic economic support for cable is the carriage of television and radio signals. Cable Television Report and Order in Docket 18397, supra., 36 F.C.C.

2d at 190; Midwest Video, supra, 406 U.S. at 664-665 (plurality). See also Southwestern, supra, 392 U.S. at 173-177.

The court of appeals is incorrect when it holds that the Commission did not tie its objectives to the Act. As with the former origination requirement, the

> . . . goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (secs. 1 and 303(g) of the Act . . .), both those who are cable viewers and those dependent on off the air service. The new rules . . . are the minimum measures . . . to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth the television broadcast service. Second Report and Order, 2 F.C.C. 2d 725, 745-46 (1966), quoted in Midwest Video, supra, 406 U.S. at 666.

See also Southwestern, supra, 392 U.S. at 174-75.[17/]

Similarly, this Court agreed that cable systems could properly facilitate the Commission's mandate "to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities . . .," as is required by Section 307(b) of the Act, 47 U.S.C. §307(b) (1977). Midwest Video, supra., 406 U.S. at 670.

17/ The Commission stated in its Order (App. B. 98) here:

> First, we continued to believe that the public interest can be significantly advanced by the opening of cable channels for use by the public and other specified users who would otherwise not likely have access to television audiences. A commitment was made to the provision of these channels in the 1972 Rules which should not be abandoned. There is, we believe, a definite societal good in keeping open these channels of communication . . . [W]e believe they can . . . result in the opening of new

(cont. on next page)

The court of appeals simply failed to read the Commission's orders here in light of Secs. 1, 303(g) and 307(b) of the Act. It gave no recognition to the past policies implementing those sections, which this Court previously found to be relevant to the supplementary nature of the Commission's cable regulations.[18]

17/ (cont. from previous page)

> outlets for local expression, aid in the promotion of diversity in television programming, act in some measure to restore a sense of community to cable subscribers and a sense of openness and participation to the video medium, aid in the functioning of democratic institutions, and improve the informational and educational communications resources of cable television communities.

18/ The failure of the court below to fully grasp the long regulatory history underlying the Commission's objectives, is no better illustrated than by its view that these objectives were (cont. on next page)

The further arguments put forth by the court for holding the regulations impermissible: that they improperly seek to regulate cable as if it were a common carrier, and that the access regulations would be illegal if promulgated for broadcast licensees, are plainly incorrect. Cable systems have, as this Court has noted, characteristics of both broadcast stations and common carriers. The Commission, in

---

18/ (cont. from previous page) of the Commission's "own design" (App. A. 33), that the Commission's goals were, "attractive euphemisms" (App. A. 35), and that the Commission was acting as if it were the "Federal First Amendment Commission." (App. A. 39). For example, the court of appeals stated that it was aware of "nothing in the Act . . . which places with the Commission an affirmative duty or power to advance First Amendment goals." (App. A. 39) Compare the contrary view of this Court in FCC v. National Citizens Committee for Broadcasting, supra., ___U.S. at___, 98 S. Ct. at 2112; Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 122 (1973).

regulating cable, has repeatedly recognized this unique technical facility. Moreover, just as the Commission has refrained from treating cable television as solely a common carrier,[19/] it has, similarly, refrained from regulating cable systems as television broadcasters.

Within the Commission's view, cable systems must, for example, carry local television signals which is essentially a common carrier function. See Midwest Video, supra., 406 U.S. at 659, n.17, where this Court noted that the court of appeals had correctly upheld this form of regulation.

However, it need not be decided in this case whether cable systems should be regulated as common carriers, for the issue here is not whether the access regulations are common carrier regulations, but whether the Commission's authority over cable systems permits such regulations. This Court has already

---

19/ See American Civil Liberties Union v. FCC, 523 F.2d 1344, (9th Cir. 1975); Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966).

indicated that such regulations would be valid if promulgated for broadcast licensees. CBS v. Democratic National Comm., supra. Moreover, the Court noted in the CBS case that while the First Amendment neither commanded nor prohibited an access scheme on broadcast stations, the Commission has as an exercise of its discretion implemented access channels on cable systems.[20/] 412 U.S. at 131; See also Midwest Video, supra., 406 U.S. at 654, n.8.

Finally it might well be argued that the access and channel requirements are more consistent with cable television's basic role, that of an entity retransmitting television signals, than the origination rule upheld in Midwest Video. Clearly, these rules coincide even with the dissent's view of a proper requirement to be imposed on CATV. 406 U.S. at 677-681 (Douglas, J., dissenting).

20/ Moreover, this Court gave no indication in CBS, as the court of appeals indicates, that properly promulgated access regulations were prohibited by Section 3(h) of the Act, 47 U.S.C. §153(h), which provides that broadcasters are not subject to common carrier regulation.

C. The Regulations Are A Rational Exercise Of The Commission's Authority And Are Based On A Consideration Of The Relevant Factors.

The eighth circuit opinion also suggests that the rules are unwise. The court believes them to be unduly burdensome (App. A.44-50) and unwarranted because of the lack of demand for access services (App. A. 86). While neither point goes to the Commission's jurisdiction, but instead, attack the reasonableness of the rules, the court is quite clearly substituting its judgment for the Commission's when it makes these assertions. Both points were extensively considered by the Commission, which concluded that the requirements were not burdensome and that the rules would fulfill long sought objectives.

The Commission weighed the public benefits "against the costs the requirements impose" (App. B. 98). Actual statistical costs of compliance were measured (App. B. 114-115), and reference was made to previous evaluations setting similar access standards (App. B. 113, 119) with regard to all facets of the

rules: channel capacity, access production, and channel designations. Only on the basis of this evaluation were modifications then made to the 1972 rules (App. B. 139).

Admittedly, the Commission was not able to exactly measure demand but this Court has held that ". . . complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deduction based on the expert knowledge of the agency.' Federal Power Commission v. Transcontinental Pipeline Corp., 365 U.S. 1, 29 . . . (1961) . . ." FCC v. National Citizens Committee for Broadcasting, supra., ___ U.S. at ___, 98 S. Ct. at 2122.

II. ON THE RECORD OF THIS CASE, THE FIRST AMENDMENT DOES NOT PROHIBIT THE ACCESS, MINIMUM CHANNEL AND EQUIPMENT REQUIREMENTS.

In Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101-114 (1973), the Court held that the First Amendment did not require that speakers who wanted to voice editorial advertisements receive access to broadcast stations. The question of access to broadcast stations under the Communications Act, the Court held, was left to the Commission's discretion in carrying out its administration of the public interest standard. Id. at 121-132.[21/] The choice ultimately would be one of practicality and desirability;

21/ "[T]he broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation . . . . [I]n Red Lion, we said 'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" CBS, supra. 412 U.S. at 101.

for example, the Court noted

> . . . In its proposed rules on cable television the Commission has provided that cable systems in major television markets "shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel." 37 Fed. Reg. 3289, §76.251(a)(4).

It is this example used by the Court in CBS that is the focus of the First Amendment issue in this case. The court of appeals held that access was prohibited not only by a lack FCC jurisdiction, but that alternatively access is prohibited by the First Amendment to the Constitution. The issue was not, of course, decided in the CBS case, but the course to petitioners seems clear. While the First Amendment does not re-

quire access in the context raised in that case, it does not prohibit access in this case.

"[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 386. In radio and television broadcasting the government chooses the speaker or licensee who in turn might select others to speak over his outlet. Government licensing and regulation of the broadcast media is permissible because broadcast frequencies are a scarce resource,[22/] and, under limited circumstances where indecent language is found, because broadcast programming has an "uniquely pervasive presence"[23/] unlike other forms of media. While the public's right is "paramount" in broadcasting, Red Lion, supra, it is not

---

22/ National Broadcasting Co. v. United States, supra, 319 U.S. at 212-213.

23/ FCC v. Pacifica Foundation, ___ U.S. ___, 98 S. Ct. 3026, 3040 (1968).

absolute, and must often be considered in light of such factors as a broadcaster's "journalistic discretion." CBS, supra. Moreover, the traditional First Amendment values which have been found to be paramount in assessing the rights of the print media have, when applied to the electronic media, been outweighed by an end that would promote a diversity of expression. FCC v. National Citizens Committee for Broadcasting, supra, ___ U.S. at ___, 98 S. Ct. at 2114; Red Lion Broadcasting Co., supra.

The court of appeals rejected the foregoing constitutional analysis applied in above broadcasting cases in deference to one applied to newspapers in such cases as Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), where a state directed right of reply to newspaper political views was rejected as being contrary to the First Amendment.[24/]

24/ The court of appeals assumes that cable television is a media entity; although it earlier concluded
(cont. on next page)

The difference is, however, of little significance in this case, since the cable access requirements do not raise the First Amendment values which the court of appeals found to be abridged.

First Amendment rights or values should, of course, be no different for broadcasters than for cable operators, newspapers, or the person in the street.[25/] It is only when those rights conflict with other Constitutional rights or societal values that an assessment of

---

24/ (cont. from previous page) that a cable system's business was that of a passive retransmitter of television signals, without public interest obligations, (App. A. 39-42, 46-50) citing, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). The issue as to whether a cable system is a media entity might be a thorny one in some contexts, but the following discussion will demonstrate, it is not of decisional significance here.

25/ See First National Bank of Boston v. Bellotti, ___ U.S. ___, 98 S. Ct. 3126 (1978).

First Amendment gains and losses must be made; this is not that case.[26] Here, the court of appeals found the access rules[27] to violate the First Amendment rights of cable operators because: 1.) the rules act as a prior restraint on his right to speak on the channels used for access (App. A. 67); 2.) access regulation enlarges government control over content (App. A. 68); 3.) access withdraws the operator's editorial discretion (App A. 71, 73); 4.) the rules fail to permit the operator to control quality (App. A. 73); 5.) the rules force the operator to enforce government obsenity restrictions (App. A. 75,76); and, 6.) access may injure the system financially by angering viewers (App. A. 79). Additionally, the eighth circuit

---

26/ See A. Meiklejohn, Political Freedom, 24-48 (1960) (Rules restricting speech do not necessarily abridge freedom of speech.)

27/ The court voiced no view about the minimum channel rules which grant no right to any speaker but only insure the technical capacity for speakers.

finds that the rules chill the rights of access users by subjecting them to obscenity restrictions administered by the operator (App. A. 75, 76) and that access because of its uncontrolled content would intrude on the rights of viewers to be free of the potential for offensive programming (App. A. 79-80).

The assessment of the above infringements are premised on a misconception about cable system operations. The court makes this fundamental error by relying on factual analogies to rights that arise in the operation of radio stations or newspapers. For example, the physical limits of radio spectrum are not the limitations of cable; nor does cable service center on journalism like newspapers. Cable systems primarily retransmit existing television signals, over which they have none of the content controls the court of appeals finds infringed here. While cable systems have some say about the distant television signals they carry, they must carry all local signals. 47 C.F.R. §§76.59-63 (1977). In fact,

the Commission's rules determine, under some circumstances, even which programs can be shown. The business of cable television is not broadcasting, or journalism, but the sale of television signals.[28/] Unlike broadcasters, who only have a small part of the spectrum to use, cable systems offer their subscribers a whole spectrum of communications services. Cable systems offer multiple channels of television, automatic services such as

---

28/ The Commission's definition of cable makes this amply clear (47 C.F.R. §76.-56(a)):

> Cable television system. A nonbroadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcast stations, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves or will serve only sub-

(cont. on next page)

burglar alarm hookups, stock reports, time and weather information. Subscribers, it is believed, "hook-up" to the cable just because it provides this spectrum. Even pay programming is sold by distributors in package form, over which the system exercises no editorial discretion. Admittedly, a system operator might choose to initiate programming on his own, but then the speech rights, which might arise would be different than the facts presented in this case. Additionally, content is wholly controlled by the access user.[29] Nor is access

---

28/ (cont. from previous page)

scribers in one or more multiple unit dwellings under common ownership, control, or management.

29/ The circuit court's arguments with regard to obscentiy review by the operator and the chilling effect it might have to the access user, were made by the court before the Commission sought and obtained remand of a case in the D.C. Circuit where those provisions were at issue. ACLU v. FCC, No. 76-1695 (D.C. Cir. remanded August 26, 1977) The Commission

(cont. on next page)

more intrusive to the viewer than broadcasting. Viewers will, in fact, be told that access channels are not broadcast channels and they can easily avoid any possible intrusion.

Finally, the court indicated that access might injure the operator financially, because he would have to pay for the channels and provide equipment under same circumstances, and because the programming might anger viewers, creating a loss of subscribers. The record in this proceeding simply fails to establish the first claim, and the second, fails to understand that the subscriber is buying channels and the more channels that are active with programming the more he has to sell.30/

29/ (cont. from previous page) has indicated to the court that it intends to repeal the rule, which required the system operator to inforce obscenity regulations, and presumably, such an action would moot the issue in this case.

30/ See B. Schmidt, Freedom Of The Press vs. Public Access, 213 (1976):

> [T]he First Amendment "costs" of access in the context of
> (cont. on next page)

In any event, the possibility for restraint of speech here is not analogous to Miami Hearld Publishing Co. v. Tornillo, supra. There, the newspaper was required to permit a response to its political views. The Court in Miami Hearld found that the statute at issue would have a chilling effect on the presentation of controversial material about public figures. Id. at 256-258. Unlike here, the statute in Miami Hearld would have resulted in an overall diminution of diversity.

Petitioners urge that there are no analogies to be drawn in this case to either broadcast stations or newspapers. Cable systems provide channels, and if the system operator chooses to speak

---

30/ (cont. from previous page)

> traditional broadcasting -- chilling effects, invasion of editorial responsibility, imposition on a mass audience "earned" by the broadcaster -- are negligible for special access channels in a cable television system.

like a broadcaster or publisher, only then do his First Amendment rights arise. In such an event, they must be judged in the context of his undertaking, and subjected to the same balancing as any other speaker.31/

31/ The D.C. Circuit has indicated that if valid First Amendment claims arise with regard to cable they would present state action questions, since cable systems are franchised by local governments and enjoy state enforced monopolies. See Home Box Office, Inc. v. FCC, supra, 567 F.2d at 46 n.82.

> Alternatively, local government involvement in the franchise and regulation of cable television, see Promise Versus Performance, supra note 30, at 20-23, might make cable owners "the state" for constitutional purposes, thus subjecting them to First Amendment scrutiny. Cf. Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952); Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974); T. Emerson, supra note 76, at 663. Again, this question cannot be resolved on the record before us.

CONCLUSION

For the foregoing reasons,[32/] Respondent, NBMC, et al. respectfully requests this Court to reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

Edward J. Kuhlmann
Jeffrey H. Olson

Of counsel:

Charles F. Firestone

32/ The petitioner in this case has not briefed the additional question surrounding the Fifth Amendment. Petitioner joins in the FCC's defense of that issue.

Counsel wish to acknowledge the assistance in the preparation of this brief of Citizens Communications Center legal intern, Judith St. Ledger-Roty.